Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

EMILIANO MONZON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States' violation of State law, in failing to warn its invitee to a national park of a latent dangerous condition known to the United States to exist within the area of the invitation, is discretionary, so that the United States may invoke the protection of the Discretionary Function Exception, 28 U.S.C. §2680(a), to the Federal Tort Claims Act, 28 U.S.C. §1346(b), against an action brought pursuant to that Act.

LIST OF PARTIES TO THE PROCEEDING

A. Named Parties

1. Petitioner, Emiliano Monzon
2. Respondent, United States of America

B. Unnamed Parties Affected by Review

1. Secretary of Commerce
2. Secretary of the Interior
3. Idalmi Monzon
4. Maribel Monzon
5. Anamaria Monzon

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Emiliano Monzon, respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case dated June 5, 2001.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-11), is reported at 253 F.3d 567. The opinions of the District Court (App. 14-31 and App. 33-35) are unreported.

JURISDICTION

The Court of Appeals entered its Judgment on June 5, 2001, and entered its order denying the petition for rehearing on December 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. §1346(b) (App. 37), waives the United States' immunity from personal injury or wrongful death actions based upon the negligence of a Government employee acting within the scope of his employment, where the United States, if a private person, would be liable under the law of the place of occurrence.

The Discretionary Function Exception, 28 U.S.C. §2680(a) (App. 37), removes from the waiver of immunity of the Federal Tort Claims Act any Government employee's act or omission which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."

STATEMENT OF THE CASE

Petitioner Monzon filed this action for wrongful death against the United States in the District Court pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b). His complaint (App. 43) alleges that his wife, Cirelda, was an invitee of the United States at an ocean-front beach in a national park in northeast Florida; that the United States knew that, on that day, a latent danger in the way of rip currents existed in the ocean bordering that beach; that the United States had a duty to warn its invited swimmers of that danger; that the United States breached that duty by giving no warning of the danger to Cirelda; and, that, as a result, Cirelda died by drowning in the rescue of one of her minor daughters who had been caught by such a rip current.

In response, the United States first moved to dismiss the complaint for lack of subject matter jurisdiction, or, in the alternative, for summary judgment (App. 41), based upon Florida's Recreational Use Statute, Section 375.251, Florida Statutes, and later filed a second motion to dismiss based specifically upon the Discretionary Function Exception, 28 U.S.C. §2680(a), to the Federal Tort Claims Act (App. 39).

The District Court granted the United States' motions to dismiss, (App. 14), based upon its conclusion that the Discretionary Function Exception was applicable to the alleged negligence, depriving the Court of subject matter jurisdiction, and, further, that the Recreational Use Statute gave immunity to the United States for any harm to its guest in the park.

In a PER CURIAM decision, the Court of Appeals affirmed the judgment for the United States (App. 1-11), finding that the failure to warn was the type of conduct the Discretionary Function Exception was designed to protect (App. 10), and, because of that finding, did not decide the issue arising from the application of Florida's Recreational Use Statute (App. 4).

REASONS FOR GRANTING THE PETITION

In affirming the District Court's dismissal of this wrongful death action for lack of subject matter jurisdiction, the Court of Appeals has established a dangerous precedent in the area of federal tort law emanating from negligence actions based upon acts or omissions of Government employees. If allowed to stand, it will emasculate the very purpose of the Federal Tort Claims Act, that is, to afford the public an avenue of compensation for injuries caused by Government employees' negligence other than by inundating the Congress with thousands of private bills each session. See *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1963).

In doing so, moreover, the Court of Appeals, after quoting from another landmark decision of this Court as follows:

> "Because the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in [Plaintiff's] complaint as true and ask whether in these circumstances, dismissal of the complaint was appropriate." *Berkovitz v. United States*, 486 U.S. 531, 540, 108 S. Ct. 1954, 1960-61 (1988). (App. 4),

omitted or altered two of the most salient facts – first, it omitted the allegation in the complaint that the decedent was an "invitee" of the United States on the beach bordering the ocean which contained the latent danger which killed her, and then it incorrectly placed that beach outside Fort Matanzas Monument (App. 2), although Monzon correctly alleged that the beach is part of that national park owned and maintained by the United States (App. 43). As a result, the "landlord-invitee" status of Cirelda, as alleged in the complaint (App. 2), was overlooked by the Court of Appeals, as well as was the fact that Cirelda and the dangerous condition were within the area of the United States' invitation. Thus, the Court of Appeals improperly eliminated the evidence of the legal error in its opinion, as well as the reason for applying the law of Florida, *infra*, with respect to a "landlord-invitee" situation.

Using the correct facts as alleged in the petitioner's complaint (App. 43-44), however, wherein Cirelda is an invitee of the United States, on the beach owned and maintained by the United States, what is the duty of the United States? As is clearly stated in the common law of

Florida, see *Post v. Lunney*, 261 So.2d 146 (Fla. 1972) and *Wood v. Camp*, 284 So.2d 691 (Fla. 1973),[1] the United States *must* warn her of the latent danger of which it had knowledge. There is no discretion allowed. Failure to give that warning is actionable negligence.

Further, the finding of the Court of Appeals that the Secretary of Commerce, acting through the National Weather Service, had the discretion of whom to advise about the rip currents (App. 7), has little, if any, relationship to the mandatory duty to warn placed upon the United States by Florida law. The Court of Appeals totally confused the issue. There is no allegation in Monzon's complaint (App. 43, 44), that the Secretary of Commerce or the National Weather Service was negligent. The allegation is that the United States breached its duty to warn its invitee of the danger of rip currents. Just how and by whom that warning had to be conveyed to Cirelda was a matter for the United States to determine. The lack of any warning by any employee of the United States was, under the applicable Florida law, plain and simple negligence, and the Discretionary Function Exception is no protection to the United States under these facts. Altering or omitting the facts alleged in the complaint of the claimant clearly violates the standard of review prescribed by this Court in *Dalehite v. United States*, *supra*, as quoted with approval by this Court in the later decision

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[1] A landowner owes an invitee alternative duties. One, the duty to use ordinary care in keeping the premises in a reasonably safe condition, and, two, a duty to give notice or warning of any latent perils known or which should have been known to the owner, but which are not known to the invitee.

on the Discretionary Function Exception in *United States v. Gaubert*, 499 U.S. 315, at 327, 111 S. Ct. 1267, at 1276, 113 L. Ed. 2d 335 (1991). By violating its own requirement to accept the facts alleged by the claimant, the Court of Appeals then had a set of facts to which it could apply the Exception and ignore the State law relative to the true facts involving the landlord-invitee relationship and the State's mandatory requirement for a warning from the landlord to the invitee.

Preceding *Gaubert, supra,* and following *Dalehite, supra,* this Court had reexamined the use and application of the Discretionary Function Exception in two other landmark cases, *United States v. S.A. Empresa de Viscao Area Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984), and *Berkovitz v. U.S.*, 486 U.S. 531, 108 S. Ct. 954, 100 L. Ed. 2d 531 (1988), the latter of which is well known for having established a "two prong test" for determining the application of the Exception – first, whether the act or omission is "discretionary," and second, whether the act or omission was a decision based on public policy. It is respectfully submitted that there is a great need for an additional pronouncement by the Court concerning the issue of the effect of State law upon the application of the Exception as to whether State law, when applied to the correct facts of the case, permits any discretion on the decision for an act or omission. Because of the language used in the Exception itself, and the decisions of other courts, *infra*, it would appear that when State law requires or prohibits an action which is not "governmental" in nature, there can be no discretion involved.

Although the issues of *Gaubert, supra,* dealt with Federal banking laws, the Opinion points to that same conclusion by the use of the following language at 111 S. Ct. 1274:

> . . . and if an employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.

and at 111 S. Ct. 1275:

> A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the Discretionary Function Exception applies in a given case." *Varig Airlines, supra,* at 813, 104 S. Ct., at 2764.

Although the Secretary of Commerce, in directing the distribution of rip current warnings, may have had the discretion of who should be on the distribution list, the United States had no room for choice in the mandatory requirement of Florida law that its invitee to use its beach in its national park had to be warned of that latent danger. The omission of that warning is not protected by the Discretionary Function Exception.

Illustratively, in *United States v. Varig Airlines, supra,* at 104 S. Ct. 2762, in referring to the legislative history of the Discretionary Function Exception and the Federal Tort Claims Act, this Court explained what the Exception would not protect, as follows:

> "On the other hand, the common law torts of employees of regulatory agencies, as well as of all Federal agencies, would be included within the scope of the bill." Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary 77th Cong., 2d Sess., 28, 33 (1942), (statement of Assistant Attorney General Francis M. Shea).

Other courts of appeals have had little difficulty in applying State law in determining the applicability of the Discretionary Function Exception to claims against the United States. Applying Texas law in *Denham v. United States*, 834 F.2d 518 (5th Cir. 1987), to an injury sustained in the swimming area by a visitor to a park owned by the United States Corps of Engineers while he was swimming in a lake there, the Fifth Circuit Court of Appeals affirmed a judgment against the United States despite the defense of the said Exception and contention that it bars the claim on the basis of sovereign immunity, saying at 834 F.2d 520:

> The government's approach would subsume practically any decision within the discretionary function exception and thereby vitiate the FTCA.

Applying South Dakota law in *Appley Brothers v. United States*, 164 F.3d 1164 (8th Cir. 1999), to a claim against the United States for negligent inspection of a grain warehouse, the Eighth Circuit Court of Appeals affirmed a judgment against the United States despite said Exception, saying, at 164 F.3d 1170:

> Our initial inquiry then is "whether the challenged actions were . . . controlled by mandatory statutes or regulations" or whether they

> were discretionary in nature. *United States v. Gaubert*, 499 U.S. 315, 328, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). If the duty was mandatory, and if the government employee violated such a duty, the discretionary function exception will not provide immunity because there is no room for choice and no discretion involved. *Id.* at 324, 111 S. Ct. 1267.

Applying New York law in *Dorking Genetics v. United States*, 76 F.3d 1261 (2nd Cir. 1996), in a claim for loss of cattle by the negligent introduction of diseased cattle into a healthy herd, the Second Circuit Court of Appeals reversed, in part, the dismissal of the claim of malpractice against the Government veterinarian, quoting, with approval from an earlier decision as follows, at 76 F.3d 1266:

> However, "for liability to arise under the FTCA, a plaintiff's cause of action must be 'comparable' to a 'cause of action against a private citizen' recognized in the jurisdiction where the tort occurred and his allegations, taken as true, must satisfy the necessary elements of that comparable state cause of action." *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) (citations omitted).

Applying North Carolina law in *Williams v. United States*, 242 F.2d 169 (4th Cir. 2001), in a wrongful death claim for refusal by an Indian hospital to render emergency care to a non-Indian, the Fourth Circuit Court of Appeals affirmed a dismissal of the action because the State law found no tort under the facts of the claim.

In *Dube v. Pittsburg Corning*, 870 F.2d 790 (1st Cir. 1989), we find this particularly applicable language at 870 F.2d 800:

> Our decision that the government is not excepted from liability under the FTCA for its breach of a state law duty to warn finds support in a host of decisions. See, e.g., *Angel v. United States*, 775 F.2d 132, 145 (6th Cir. 1985), (failure to warn of danger of high voltage wire); . . . (omitting citations from the 6th, 5th, 10th, 9th and 3rd Circuit Courts of Appeals).

Although not involving State law, but rather finding that a duty arose under maritime law in *Sutton v. Earles*, 26 F.3d 903, at 910 (9th Cir. 1994), the Ninth Circuit Court of Appeals found that the discretionary function exception would not apply to the mandatory requirement of posting speed limit signs in navigable waters.

Finally, in *Kelly v. United States*, 241 F.3d 755 (9th Cir. 2001), the Ninth Circuit Court of Appeals summarized the matter quite succinctly at 241 F.3d 760, as follows:

> Under the first prong of the *Berkovitz* test, where the alleged conduct violates a mandatory directive, whether by statute, regulation or policy, the conduct is not discretionary because there is no choice or judgment involved.

In summary, this Court should review this decision of the Court of Appeals affirming the dismissal of this claim on the basis of the application of the Discretionary Function Exception because of the allegations of negligence under State law. As stated by this Court, when discussing the reasoning behind the enactment of the Federal Torts Claims Act, in *Indian Towing Co. v. United*

States, 350 U.S. 61, at 68, 76 S. Ct. 122, 126, 100 L. Ed. 48 (1955):

> The broad and just purpose which the statute was designed to effect was to compensate the victim of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statue designed to limit it.

In order to maintain uniformity among all of the courts of appeals and district courts in their application of the Discretionary Function Exception, and to fulfill the intent of Congress' enactment of the Federal Tort Claims Act, this Court should issue a writ of certiorari to review the Opinion of the Court of Appeals and bring an immediate halt to this erosion of the benefit intended.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16206
Non-Argument Calendar

D.C. Docket No. 99-00346-CV-J-21C

EMILIANO MONZON,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida.

(Filed June 5, 2001)

Before ANDERSON, Chief Judge, and CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The district court dismissed Plaintiff Emiliano Monzon's claim brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), for lack of subject matter jurisdiction, holding that the discretionary function exception to the limited waiver of sovereignty contained in the FTCA barred Plaintiff's claim. We affirm.

I. BACKGROUND

On May 17, 1998, Plaintiff's wife, Cirelda Monzon, and her three children drove to the beach area located at Fort Matanzas Inlet. Adjacent to the beach area is the Fort Matanzas National Monument, which is controlled by the National Park Service, a division of the Department of Interior. Sometime that afternoon one of Cirelda's daughters was caught in a rip current. While attempting to rescue her daughter, Cirelda died by drowning.

On that same day, the National Weather Service ("NWS") in Jacksonville, Florida, broadcasted two "Hazardous Weather Outlook[s] for Southeast Georgia and Northeast Florida" that mentioned rip currents, one at 5:15 a.m. and one at 3:14 p.m. These "Hazardous Weather Outlooks" were announced on the National Oceanic and Atmospheric Administration Weather Channel and were sent via long wire to vendors, whose paid subscribers included media entities.

In May 1998, it was not a routine practice of the NWS to publish information on rip currents. In fact, at that time, the NWS was engaged in an experimental project with the St. Johns County Beach Patrol to determine if rip current activity could be predicted. As part of this experiment, an agent of the St. Johns County Beach Patrol provided data from the beach to NWS officials.

On May 17, 1998, an agent from NWS contacted the St. Johns County Beach Patrol to inform it that the experimental computer model suggested that the beach area would soon experience increased rip current activity. This information was never communicated to Plaintiff's wife. Approximately ten minutes later, the St. Johns County

Beach Patrol received its first distress call of the afternoon.

II. PROCEDURAL HISTORY

On April 16, 1999, Plaintiff filed this wrongful death action against the United States pursuant to the FTCA, 28 U.S.C. § 1346(b). Plaintiff's claim was that, knowing of the danger of rip currents on May 17, 1998, and knowing of the public's presence and use of the beach to go swimming, the United States breached its duty to warn Cirelda Monzon and her daughters of the hidden danger of the rip currents in the surf at the beach on that date.

On June 9, 2000, the United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), arguing that the discretionary function exception contained in 28 U.S.C. § 2680(a) barred Plaintiff's claim. On September 26, 2000, the district court granted the United States' motion to dismiss for lack of subject matter jurisdiction.[1]

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[1] In the court below, the United States also argued that Plaintiff's action was barred by Florida's Recreational Use Statute, Fla. Stat. § 375.251, and the district court relied on this statute as an alternate ground for dismissal of Plaintiff's claim. Because we hold, *infra*, that Plaintiff's claim was properly dismissed pursuant to the discretionary function exception to the FTCA, we need not decide whether Plaintiff's claim was barred under the Florida Recreational Use Statute.

III. DISCUSSION

On appeal, Plaintiff argues that the district court erred in granting the United States' motion to dismiss. "Because the decision we review adjudicated a motion to dismiss, we accept all of the factual allegations in [Plaintiff's] complaint as true and ask whether, in these circumstances, dismissal of the complaint was appropriate." *Berkovitz v. United States*, 486 U.S. 531, 540, 108 S. Ct. 1954, 1960-61 (1988).

It is well-settled that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *Mid-South Holding Co. v. United States*, 225 F.3d 1201, 1203 (11th Cir. 2000) (quoting *United States v. Sherwood* 312 U.S. 584, 586, 61 S. Ct. 767, 769 (1941)). The FTCA waives the sovereign immunity of the United States for certain torts committed by its employees and authorizes suits against the United States for:

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).[2]

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[2] Because we conclude, *infra*, that the discretionary function exception bars Plaintiff's claim, we need not decide whether the United States, if a private person, would be liable to Plaintiff in accordance with Florida law.

The United States' waiver of sovereign immunity under the FTCA is limited, however, by several statutory exceptions. The relevant exception in this case is the "discretionary function" exception, 28 U.S.C. § 2680(a). Under that exception, the United States is not liable for:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

The Supreme Court has established a two-prong analysis to determine when government employee action is protected by the discretionary function exception. *See Berkovitz*, 486 U.S. at 536-37, 108 S. Ct. at 1958-59. First, the action must involve an element of "judgment or choice." *Id.* at 536, 108 S. Ct. at 1958. The exception does not apply "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because under those circumstances, "the employee has no rightful option but to adhere to the directive." *Id.* at 536, 108 S. Ct. at 1958-59. Second, if the challenged conduct involves an element of judgment or choice, "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 536, 108 S. Ct. at 1959. "The

basis for the discretionary function exception was Congress' desire to 'prevent judicial' second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 536-37, 108 S. Ct. at 1959 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814, 104 S. Ct. 2755, 2764-65 (1984)). Therefore, the exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 537, 108 S. Ct. at 1959.

The government action at issue here is the United States' failure to warn Plaintiff's wife of the danger of rip currents in the surf near the beach area at Fort Matanzas Inlet on May 17, 1998. We must first determine whether this challenged conduct by the United States involved an element of "judgment or choice." *Berkovitz*, 486 U.S. at 536, 108 S. Ct. at 1958.

Title 15 U.S.C. § 313 sets forth the following duties of the Secretary of Commerce:

> The Secretary of Commerce shall have charge of the forecasting of weather, the issue of storm warnings, the display of weather and flood signals for the benefit of agriculture, commerce, and navigation, the gauging and reporting of rivers, the maintenance and operation of seacoast telegraph lines and the collection and transmission of marine intelligence for the benefit of commerce and navigation, the reporting of temperature and rain-fall conditions for the cotton interests, the display of frost and cold-wave signals, the distribution of meteorological information in the interests of agriculture and commerce, and the taking of such meteorological observations as may be necessary to establish

> and record the climatic conditions of the United States, or as are essential for the proper execution of the foregoing duties.

15 U.S.C. § 313.

It is clear that, under the statute, the Secretary of Commerce has broad discretion to determine the manner in which it will forecast the weather and issue storm warnings. Because no federal statute, regulation, or policy required the United States to warn Plaintiff's wife of the danger of rip currents in the surf, the first prong of the discretionary function exception is satisfied. Numerous cases have held that government action related to weather forecasting and the issuance of warnings are "discretionary functions." *See e.g., Brown v. United States*, 790 F.2d 199 (1st Cir. 1986) (concluding that, "[w]ithout question, a weather service constitutes [a discretionary function]" and holding that the United States was not liable for death of fishermen who drowned in storm which NWS failed to predict); *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435 (5th Cir. 1984) (concluding that actions taken by area manager of NWS "were clearly discretionary functions" and holding that plaintiff's claim that NWS negligently failed to predict the weather and tidal conditions accurately and to warn plaintiff was barred by the discretionary function exception); *Nat'l Mfg. Co. v. United States*, 210 F.2d 263 (8th Cir. 1954) (where plaintiffs brought suit against the United States for negligently making or withholding weather and flood information, holding that, because the Government was "vested by the statute with wide latitude of discretion to determine whether in [its] opinion such forecasting [was] advisable," the "forecasting or omission of forecasts by

the [Weather] Bureau [was] a discretionary function"); *Bergquist v. United States*, 849 F. Supp. 1221 (N.D. Ill. 1994) (holding that plaintiffs' claim that NWS was negligent in its forecasting and issuance of warnings regarding a tornado fell within the discretionary function exception to the FTCA).

We also conclude that the second prong of the discretionary function exception analysis – that this is the kind of judgment that the exception was designed to shield – is satisfied. *See Berkovitz*, 486 U.S. at 536, 108 S. Ct. at 1959. The Supreme Court has held that, "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *United States v. Gaubert*, 499 U.S. 315, 324, 111 S. Ct. 1267, 1274 (1991). "For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Id.* at 324-25, 111 S. Ct. at 1274-75.

Cost concerns are one policy consideration that the United States takes into account in making its forecasts and issuing warnings. *See e.g.*, 15 U.S.C. § 315 (stating that the Secretary of Commerce is "authorized to make such changes or assignment to duty in the personnel or detailed force of the National Weather Service for limiting or reducing expenses as he may deem necessary"). If the United States were required to warn individual visitors to the beach of the danger of rip currents, this could create

significant cost concerns for the United States. *See Brown*, 790 F.2d at 204. In *Brown*, the First Circuit stated:

> [F]rom the standpoint of the government, the Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care. A weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources. Weather predictions fail on frequent occasions.If in only a small proportion parties suffering in consequence succeeded in producing an expert who could persuade a judge, as here, that the government should have done better, the burden on the fisc would be both unlimited and intolerable.

Brown, 790 F.2d at 204. *See also Bergquist*, 849 F. Supp. at 1224 (recognizing the cost and budgetary considerations in the NWS's forecasting and warning services).

In *Bergquist*, the plaintiffs filed suit against the United States under the FTCA, alleging that the NWS was negligent in its forecasting and issuance of warnings regarding a tornado. *See* 849 F.Supp. at 1224. After analyzing numerous cases recognizing the discretionary nature of the NWS' function and dismissing suits based upon the NWS' failure to provide adequate or timely warnings of impending severe weather, the district court held that the acts and omissions complained of fell within the discretionary function exception to the FTCA. *See id.* at 1227-28. The court recognized three policy factors implicated in the NWS' functions: (1) cost and budgetary

policy considerations in the NWS' forecasting and warning services; (2) the general "don't overwarn" policy in which the NWS strives for "the highest rate of severe weather detection while maintaining the lowest possible false alarm rate in the issuance of warnings," and (3) the policy of vesting discretion in the forecaster. *See id.* at 1228-29.

We conclude that the challenged conduct in this case – the United States' failure to warn Plaintiff's wife of the danger of rip currents in the surf – is the type of conduct that the discretionary function exception was designed to protect. Nor does *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122 (1955), on which Plaintiff relies, suggest that the United States should be subject to liability in this case. In *Indian Towing*, the plaintiff sued the Government for failure to maintain a lighthouse in good working order. The Government did not attempt to invoke the benefit of the discretionary function exception. Instead, it argued that the FTCA did not impose liability for the negligent exercise of "uniquely government functions." *Id.* at 64, 76 S. Ct. at 124. Although the Supreme Court held that the United States was subject to suit under the FTCA in that case, it did so because "the failure to maintain the lighthouse in good condition . . . did not involve any permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 538 n.3, 108 S. Ct. at 1959 n.3 (citing *Indian Towing*, 350 U.S. at 69, 76 S. Ct. at 126-27).

Thus, we hold that the United States' failure to warn Plaintiff's wife of the danger of rip currents in the surf near the beach area at Fort Matanzas Inlet on May 17, 1998, involved the exercise of discretion in furtherance of public policy considerations and that Plaintiff's claim is

therefore barred by the discretionary function exception to the FTCA.

III. CONCLUSION

Accordingly, we affirm the district court order dismissing Plaintiff's claim for lack of subject matter jurisdiction.[3]

AFFIRMED.

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[3] Plaintiff's request for oral argument is denied.

United States Court of Appeals
For the Eleventh Circuit

No. 00-16206

District Court Docket No.
99-00346-CV-J-21C

EMILIANO MONZON,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed June 5, 2001)

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: June 5, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE

JAN 07 2002

U.S. COURT OF APPEALS
ATLANTA, GA.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EMILIANO MONZON,

Plaintiff,

V. **CASE NO. 3:99-cv-346-J-21C**

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

(Filed Sep. 26, 2000)

This cause comes before the Court on the following motions and memoranda filed by the Defendant: 1) "United States' Motion to Dismiss or in the Alternative for Summary Judgment" with supporting Memorandum of Law (Dkt. 4); 2) "Reply in Support of United States' Motion to Dismiss or in the Alternative for Summary Judgment" (Dkt. 17); and 3) "United States' Motion to Dismiss (Based upon 28 U.S.C. § 2680(a), Discretionary Function Exception)" with supporting Memorandum of Law (Dkts. 21 & 22). The Plaintiff filed a response in opposition to the above motions (Dkts. 6, 18 & 25).

I. Factual Background

The facts set forth herein are undisputed. On May 17, 1998, the Plaintiff's decedent, Cirelda Monzon, traveled to a beach area located at the Fort Matanzas Inlet, which is south of St. Augustine, Florida. Adjacent to the beach area is the Fort Matanzas National Monument, which is

controlled by the National Park Service, a division of the Department of Interior.

The decedent was accompanied to the beach by her daughters. Instead of walking across the access ramp to the beach for free, the decedent elected to pay a fee to drive her vehicle across the ramp and park on the beach. The fee was imposed by agents employed by St. Johns County, Florida. The Defendant did not receive any portion of the parking fee collected by the County.

At some point on the afternoon of May 17, 1998, while swimming in the waters of the Atlantic Ocean, one of the decedent's daughters[1] was caught in a rip current. In the process of attempting to rescue her daughter, the decedent drowned. Her daughter was saved. Lifeguards employed by the county were on duty; however, the lifeguards were patrolling the entire beach area in vehicles vice manning designated stations.

On the same day, unbeknownst to the decedent, the National Weather Service ("NWS") in Jacksonville, Florida, broadcast two "Hazardous Weather Outlook[s] for Southeast Georgia and Northeast Florida" that mentioned rip currents. The first was disseminated at 5:15 a.m. and the latter at 3:14 p.m. The NWS' outlooks were announced on the National Oceanic and Atmospheric Association ("NOAA") Weather Channel as well as being

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[1] The "Plaintiff's Additional Response to Defendant's Motions to Dismiss or for Summary Judgment" (Dkt. 18), conflicts with his Complaint in that the former states that *both* daughters were caught in the rip current and *both* were saved.

transmitted via long wire to vendors, whose paid subscribers included various media entities. Additionally, in May of 1998, officials from the NWS were conducting a project in an attempt to determine whether rip current activity could be predicted. To that end, NWS officials were provided data from the subject beach by an agent from the St. Johns Beach Patrol. On May 17, 1998, approximately ten (10) minutes prior to receiving the first distress call of the afternoon, an agent from NWS contacted the St. Johns Beach Patrol to inform them the experimental computer model suggested the beach area would shortly experience increased rip current activity. This information was never communicated to the decedent. Ultimately, in 1999, as a result of the data collection and the NWS project, the St. Johns Beach Patrol instituted a flag warning system to indicate whether strong rip currents were probable.

Lastly, with respect to the issue of the owner of the real property in question, for purposes of the subjection motions, and without tracing the title back to the days of King Phillip II of Spain, the State of Florida ceded to the United States exclusive jurisdiction of 298.51 acres of land on both sides of the Matanzas River on December 22, 1967. The bounds of that cession extended to the mean high water line[2] of the Atlantic Ocean – but not below it.

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[2] "Mean high water" is defined as follows: "A tidal datum. The arithmetic mean of the high water heights observed over a specific 19-year Metonic cycle (the National Tidal Datum Epoch). . . . " National Ocean Service, a division of the National Oceanic and Atmospheric Administration, *Tidal Current Tables 1998, Atlantic Coast of North America.*

II. Procedural Background

The Plaintiff brought his Complaint (Dkt. 1) for damages for wrongful death pursuant to the Federal Tort Claims Act ("FTCA"), Title 28 U.S.C. § 1346(b). The Defendant filed a Motion to Dismiss or in the Alternative a Motion for Summary Judgment (Dkt. 4) asserting that the Court lacked subject matter jurisdiction over the claim; or in the alternative, for summary judgment because there was no genuine issue of material fact. Specifically, the Defendant averred that the Court lacked subject matter jurisdiction because the Defendant did not owe a duty to the Plaintiff's decedent since it did not own or control the area in which the drowning occurred. Alternatively, the Defendant asserted it was entitled to summary judgment because Florida Statute § 375.251 ("Limitations on liability of persons making available to public certain areas for recreational purposes without charge") exempted it from liability. The Plaintiff responded (Dkt. 6) that the Defendant did, in fact, own or control the "beach." Specifically, the Defendant controlled both the vehicle ramp access to the beach as well as the area between the parking area up to the mean high water line of the Atlantic Ocean. The Plaintiff further argued that the Defendant was not shielded by Florida Statute § 375.251. In its reply (Dkt. 17), the Defendant supplemented its two-pronged argument that it: 1) did not own or control the area in which the droning occurred; and 2) was entitled to the protection afforded by Florida Statute § 375.251. In a footnote, the Defendant asserted it was also shielded by the discretionary function exception, found at Title 28 U.S.C. § 2680(a), to the waiver of sovereign immunity contained in the FTCA. The Plaintiff's

rebuttal (Dkt. 18) attempted to refocus his claim to assert that, once the Defendant assumed the duty to warn of the danger of rip currents, it did so in a negligent manner.

In response to the Plaintiff's attempt to refocus his claim, the Defendant filed an additional Motion to Dismiss (Dkt. 21), which asserted in substantially greater detail that the discretionary function exception of the FTCA also prevented this Court from establishing subject matter jurisdiction over this claim. In his rebuttal (Dkt. 25), the Plaintiff argued that the discretionary function was inopposite; [sic] rather the Complaint alleged that once the Defendant assumed the duty to warn, the discretionary aspect of the equation was eviscerated.

III. Pertinent Legal Principles

A. Motion to Dismiss Standard

In evaluating the sufficiency of a complaint for purposes of a motion to dismiss, the allegations of the complaint must be accepted as true, *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), and viewed in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). With regard to dismissing a complaint with prejudice, the general rule in the Eleventh Circuit is that where a "more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991). Two exceptions exist: (1) where the plaintiff expresses a desire

not to amend the complaint; and (2) where "a more carefully drafted complaint could not state a claim under the standard of *Conley [v. Gibson]*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, [2 L.Ed.2d 80, 84 (1957)], dismissal with prejudice is proper." *Id.*

B. Summary Judgment Standard

Summary judgment is appropriate only when a court is satisfied "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In making this determination, a court must view all the evidence in the light most favorable to the non-moving party. *See Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The burden of establishing the absence of a genuine issue is on the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, the burden extends only to facts that might impact the outcome of the suit under the governing law. "The substantive law will identify which facts are material. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). Once this burden is met, Rule 56(e), Federal Rules of Civil Procedure, requires that the non-moving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' [ad] designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274. "The mere existence of a scintilla of evidence in support of the plaintiff's position is not sufficient to successfully

oppose summary judgment; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214, (holding a dispute over a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party). *See also Samples*, 846 F.2d at 1330.

C. Florida Statute § 375.251

Florida Statute § 375.251, "Limitation on liability of persons making available to public certain areas for recreational purposes without charge," states in part:

> (1) The purpose of this act is to encourage persons to make available to the public land, water areas and park areas for outdoor recreational purposes by limiting their liability to persons going thereon and to third persons who may be damaged by the acts or omissions of persons going thereon.
>
> (2)(a) An owner or lessee who provides the public with a park area or other land for outdoor recreational purposes owes no duty of care to keep that park area or land safe for entry or use by others, or to give warning to persons entering or going on that park area or land of any hazardous conditions, structures, or activities thereon. An owner or lessee who provides the public with a park area or other land for outdoor recreational purposes shall not by providing that park area or land:
>
> 1. Be presumed to extend any assurance that such park area or land is safe for any purpose,

2. Incur any duty of care toward a person who goes on that park area or land, or
3. Become liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on that park area or land.

(b) This section shall not apply if there is any charge made or usually made for entering or using such park area or land, or any part thereof, or if any commercial or other activity, whereby profit is derived from the patronage of the general public, is conducted on such park area or land, or any part thereof.

* * *

(4) This act does not relieve any person of liability which would otherwise exist for deliberate, willful or malicious injury to persons or property. The provisions hereof shall not be deemed to create or increase the liability of any person.

(5) The term "outdoor recreational purposes" as used in this act shall include, but not necessarily be limited to, hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, motorcycling, and visiting historical, archaeological, scenic, or scientific sites.

The Eleventh Circuit has analyzed Florida Statute § 375.251 on two occasions in the past two decades. In *Kleer v. United States*, 761 F.2d 1492 (11th Cir. 1985), the court held that the statute bars suits for injuries sustained in areas of parks where no fee is charged. A year later, in

reaffirming its decision in *Kleer*, the court found the statute inapplicable because the United States "provided neither the recreational fishing pier nor the approach to the pier [where the accident occurred]." *Terrell v. United States*, 783 F.2d 1562, 1567 (1986).

D. Sovereign Immunity

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). The United States Supreme Court has held that a "waiver of immunity 'must be unequivocally expressed in statutory text.' " *Mid-South Holding Co. v. United States*, No. 99-2488, 2000 WL 1239257 (11th Cir. 2000), *quoting Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096, 135 L.Ed.2d 486, 492 (1996).

1. Federal Tort Claims Act

The FTCA waives the federal government's sovereign immunity for damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28 U.S.C. § 1346(b).

2. Federal Tort Claims Act Discretionary Exception

The FTCA's waiver of immunity is subject to various exceptions; the discretionary function is one such exception. *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335, 346 (1991). The exception provides that the federal government is not liable for

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Title 28 U.S.C. § 2680(a).

"This exception . . . 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.' " *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531, 536 (1988) (*quoting United States v. Varig Airlines*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2761-62, 81 L.Ed.2d 660, 671 (1984)). In order to determine whether the conduct of a government agency falls within the scope of this exception, a court must execute a two-step analysis. *Mid-South Holding*, 2000 WL 1239257, at 3.

> First, a reviewing court must ascertain the nature of the challenged conduct and assess

> whether it involved an element of judgment or choice [citation omitted]. Second, the court decides "whether that judgment is of the kind that the discretionary function exception was designed to shield."

Id., citing, Gaubert, 499 U.S. at 322, 111 S.Ct. at 1273, 113 L.Ed.2d at 346 (*quoting Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958, 100 L.Ed.2d at 541).

With respect to the first prong of the analysis, the Supreme Court has stated that

> the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice then there is no discretion in the conduct for the discretionary function exception to protect.

Berkovitz, 486 U.S. at 536, 108 S.Ct. at 1958-59, 100 L.Ed.2d at 540-41.

With respect to the second prong, the Eleventh Circuit has held that

> because the purpose of the [discretionary function] exception is to prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort, [citation omitted] we must determine, in applying the second prong of the *Gaubert* analysis,

> whether the challenged conduct of the government agency or employee is "susceptible to policy analysis."

Mid-South Holding, 2000 WL 1239257, at 3 (*quoting Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275, 113 L.Ed.2d at 348).

IV. Defendant's Motions

A. Ownership or Control of the Real Property

The Defendant initially asserts that, because it neither owned nor controlled the beach area where the decedent drowned, it necessarily follows that the Defendant cannot be held accountable for the tragic outcome. In other words, the Defendant is arguing that, because it does not own or control the area below the mean high water line, it had no legal duty to warn the decedent about dangerous conditions in the ocean. Before altering the course of this argument, the Plaintiff went to great lengths to rebut the Defendant's assertions by submitting exhibits to prove the Defendant owned both the parcels of land around the access ramp and the parking area in which the decedent left her vehicle – in short, all the land up to the mean high water line.

The facts are insufficiently developed for this Court to make a definitive factual conclusion that the dangerous condition that allegedly cause [sic] the decedent's demise was located in an area under the control and ownership of the Defendant. While both parties were content to stop their title search at the mean high water mark, ownership and control of the ocean can and does vary between the

federal and state governments. Neither party has produced any evidence as to the location of the rip current or the decedent in the ocean. The production of such evidence, however, will be unnecessary because the Defendant has submitted two alternative grounds, discussed *infra*, that compel dismissal of this case.

B. Florida Statute § 375.251

In the alternative, the Defendant argued that, even if this Court determined that the Defendant's responsibility extended into the ocean, the Defendant was nevertheless shielded from this lawsuit by Florida Statute § 375.251. The Plaintiff rebutted this affirmative defense by asserting that: 1) the statute's protection from suit terminated if any financial charge was made for entry to the park; and 2) the Eleventh Circuit's opinion in *Kleer, supra*, was distinguishable and contrary to Florida appellate case law.

As to his first argument, the Plaintiff attempts to show that the Defendant indirectly benefited from the parking fee charged by the county and thus forfeited the protection of the statute. This argument is without merit. A few was charged and collected by agents of the County, no portion of which was received by the Defendant. The Plaintiff has produced no evidence supporting his allegation that the Defendant forfeited the protection of the statute because it charged a fee for entering or using the beach area.

In his second argument, the Plaintiff attempts to distinguish *Kleer* by asserting that the Eleventh Circuit only decided the limited issue of whether the statute prohibited lawsuits for injuries sustained in areas of parks

where no fees had been charged. The Plaintiff's argument ignores the obvious conclusion that, in order for the Eleventh Circuit to have reached the specific issue in Kleer of whether the United States forfeited the statute's protection because a fee was charged, the court necessarily had to assume the statute shielded the federal government. The Plaintiff does correctly argue that Florida appellate case law is clear that the statute has been interpreted to only protect private individuals and not state government agencies. *See Cox v. Community Serv. Dep't Etc.*, 543 So.2d 297 (Fla. 5th DCA); *City of Pensacola v. Stamm*, 448 So.2d 39 (Fla. 1st DCA 1984); *Chapman v. Pinellas County*, 423 So.2d 578 (Fla. 2nd DCA 1982); *Metropolitan Dade City v. Yelvington*, 392 So.2d 911 (Fla. 3rd DCA 1980); and *McPhee v. Dade County*, 362 So.2d 74 (Fla. 3rd DCA 1978). Regardless of the state appellate law interpretation, it is equally clear that this Court is bound by Eleventh Circuit precedent. The Eleventh Circuit has twice had the opportunity to hold that the statute does not shield the federal government, yet has declined to do so.

C. FTCA Discretionary Exception

The Defendant's final argument is that the lawsuit is barred by the discretionary function exception to the United States' waiver of sovereign immunity. This defense was asserted in response to the Plaintiff's act of refocusing his argument to assert that his allegation was not that the Defendant had a duty to warn the decedent of the hidden dangers in the ocean, but rather that the

Defendant negligently performed its duties after undertaking them.[3] In other words, the Defendant's failure to communicate the warning to the decedent was negligent.

As previously discussed *supra*, to analyze whether the Defendant is shielded by the discretionary function exception, this Court must isolate the nature of the challenged conduct and determine whether it involved an element of judgment or choice. *Mid-South Holding*, 2000 WL 1239257, at 3. If it does, this Court must then decide whether that judgment is of the kind that the discretionary function exception was designed to shield. *Id.*

From an organizational standpoint, the National Weather Service is subordinate to the Department of Commerce, which is found within the Executive Branch of the federal government. Title 15 U.S.C. § 313 charges the Secretary of Commerce with a vast array of responsibilities. Chief among those duties is the forecasting of the weather, issuing storm warnings, and displaying weather and flood signals for the benefit of agriculture, commerce, and navigation. Beyond § 313, there is a dearth of written statutory guidance to which the Secretary may refer. Thus, it is evident that the Secretary has broad discretion in implementing the means by which the National Weather Service is to accomplish its mission.

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[3] The relevant portion of the Complaint states: "Knowing of said danger and knowing of the public's presence and use of said beach to go swimming, Defendant had a duty to warn Cirelda Monzon and her daughters of the danger of rip currents in the surf at the said beach on that date. . . . " (¶ 7 of the Complaint, Dkt. 1).

The first prong of the analysis is satisfied because there is plainly no statute or regulation that requires the Defendant to communicate warnings of rip currents to individual beachgoers. Furthermore, it is important to note that on May 18, 1998, the date of this incident, the project involving the attempt to predict rip currents had not been completed.

As to the second prong of the analysis, the Defendant initially argued that because the project was still ongoing no procedure had been established of publicizing a warning to individual beachgoers. Next, the Defendant argues that deciding how, when and to whom to report rip current conditions is a product of the balancing of competing policy considerations. Specifically, a NWS decision to warn the public about a specific weather condition is measured against the need to minimize the publication of false alarms. The Defendant argues that minimizing false alarms results in the public taking more seriously the warnings that are actually published to the general public.

The Plaintiff's response to the Defendant's assertion that the discretionary exception barred this lawsuit entirely ignored the statutory guidance provided to the Secretary of Commerce and the appellate case law concerning the discretionary function exception. Instead, the Plaintiff continued to argue that, because NWS elected to broadcast the warnings via the two means mentioned *supra*, the Defendant was negligent because the warning was not directly communicated to the individual beachgoers. This argument does nothing to counter the Defendant's assertion that the decision to issue a warning and

to whom it should be communicated, are discretionary acts.

V. Conclusion

For the reasons hereinabove discussed, the Court finds that the Defendant has not waived its sovereign immunity for claims based on the alleged negligent performance of a discretionary function and, thus, this Court lacks subject matter jurisdiction over Plaintiff's claim. Further, even if the Defendant had control over the ocean where the incident occurred, this Court finds that Florida Statute § 375.251 would also serve to bar such claim.

Upon consideration of the foregoing, it is hereby **ORDERED** and **ADJUDGED**:

1. Defendant's Motion to Dismiss (Dkt. 4) is **GRANTED in part, with prejudice.**

2. Defendant's Motion to Dismiss (Dkt. 21) is **GRANTED with prejudice.**

3. All other motions, if any, are **DENIED as moot.**

4. The Clerk is **DIRECTED** to enter judgment accordingly, and close the file.

DONE AND ORDERED, at Jacksonville, Florida, this 26th day of September, 2000.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to: Counsel of record
Denise Seymour, Courtroom Deputy Clerk
Margaret Costa, Judicial Assistant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CIVIL CASE

EMILIANO MONZON,

Plaintiff,

Case No. 3:99-cv-346-J-21C

v.

(Filed Sep. 26, 2000)

UNITED STATES OF AMERICA,

Defendant.

_____/

___ **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Order entered on September 26, 2000, this action is dismissed with prejudice.

SHERYL L. LOESCH
Clerk

Date: September 26, 2000

/s/ Jane E. Cummings
(By) Deputy Clerk

Copy to:
Counsel of Record
Pro Se Parties (if any)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EMILIANO MONZON,

Plaintiff,

CASE NO.
3:99-cv-346-J-21C

V.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

(Filed Oct. 25, 2000)

This cause comes before the Court on the "Plaintiff's Motion for Rehearing" (Dkt. 31) with supporting Memorandum of Law (Dkt. 32). The Defendant filed a response in opposition thereto (Dkt. 33).[1]

The Plaintiff has moved for a rehearing on: 1) the "United States' Motion to Dismiss or in the Alternative for Summary Judgment" (Dkt. 4); 2) the "United States' Motion to Dismiss (Based upon 28 U.S.C. § 2680(a), Discretionary Function Exception)"; and 3) this Court's Order (Dkt. 29) dismissing the case.

Although the Plaintiff did not identify whether his request was being made pursuant to Rule 59(e) or Rule 60(b), Federal Rules of Civil Procedure, his grounds for rehearing are strikingly similar to the arguments he made

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[1] Defendant's response incorrectly lists the Honorable Charles R. Wilson, United States Circuit Judge, Eleventh Circuit Court of Appeals, as the United States Attorney.

in opposition to the Defendant's Motions to Dismiss. Nevertheless, after a careful and thorough review of the Plaintiff's most recent arguments, the Court reiterates its findings that: 1) the Defendant was shielded by the discretionary function exception; and 2) Florida Statute § 375.251 bars this particular claim.

Specifically, as to the first basis this Court found that at the time of this incident the Defendant had not undertaken the responsibility of warning beachgoers of dangerous rip currents, and, therefore, the Defendant's decision with respect to whom it should warn remained a discretionary one. *See Mid-South Holding Co. v. United States*, No. 99-2488, 2000 WL 1239257 (11th Cir. 2000).

As to the second basis, this Court is subordinate to the United States District Court of Appeals for the Eleventh Circuit and, thus, is bound to follow the precedent set by *Kleer v. United States*, 761 F.2d 1492 (11th Cir. 1985) (holding that Florida Statute § 375.251 barred the action against the United States and specifically stating that it was following Florida precedent by holding that the statute bars suits for injuries sustained in areas of parks where no fee is charged and no commercial activity takes place). All but one of the Florida appellate cases cited by the Plaintiff were decided prior to the Eleventh Circuit's opinion in *Kleer*. *See Cox v. Community Serv. Dep't Etc.*, 543 So.2d 297 (Fla. 5th DCA 1989); *City of Pensacola v. Stamm*, 448 So.2d 39 (Fla. 1st DCA 1984); *Chapman v. Pinellas County*, 423 So.2d 578 (Fla. 2nd DCA 1982); *Metropolitan Dade City v. Yelvington*, 392 So.2d 911 (Fla. 3rd DCA 1980); and *McPhee v. Dade County*, 362 So.2d 74 (Fla. 3rd DCA 1978).

Upon consideration of the foregoing, it is hereby **ORDERED:**

1. Plaintiff's Motion for Rehearing (Dkt. 31) is **DENIED.**

2. The Clerk is **DIRECTED** to close the file.

DONE AND ORDERED, at Jacksonville, Florida, this 25th day of October, 2000.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to Counsel of record
Denise Seymour, Courtroom Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-16206-GG

EMILIANO MONZON,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(Filed Dec. 27, 2001)

BEFORE: ANDERSON, Chief Judge, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Emiliano Monzon is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
CHIEF JUDGE

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28 U.S.C. § 1346. United States as defendant

* * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * *

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28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused.

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EMILIANO MONZON, Plaintiff. v. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 99-346 Civ-J-21C

UNITED STATES' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT (A DISPOSITIVE MOTION)

Defendant, United States of America, by its undersigned counsel, moves for dismissal of this action pursuant to Fed. R. Civ. P. 12(b)(1), because the Court lacks subject matter jurisdiction over this claim; or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(b), because there is no genuine dispute of material fact, and the United States is entitled to judgment as a matter of law. In support of its motion, the United States respectfully refers the Court to the Declaration of Gordon J. Wilson, with exhibits attached to this Motion, to the accompanying memorandum of law in support of this motion, and to the entire record herein.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

CHARLES R. WILSON
United States Attorney

PAUL F. FIGLEY
Deputy Director
Torts Branch, Civil Division

/s/ Elaine Marzetta Lacy
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

EMILIANO MONZON, Plaintiff. v. UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. 99-346 Civ-J-21C

UNITED STATES' MOTION TO DISMISS
(BASED UPON 28 U.S.C. 2680(a),
Discretionary Function Exception)
(A DISPOSITIVE MOTION)

Defendant, United States of America, by its undersigned counsel, moves for dismissal of this action pursuant to Fed. R. Civ. P. 12(b)(1), because the Court lacks subject matter jurisdiction over this claim. In support of its motion, the United States respectfully refers the Court to the accompanying memorandum of law in support of this motion, and to the entire record herein.

Respectfully submitted,

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Attorneys for Defendant,
United States of America

IN THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

99-346-CIV-J-21C

EMILIANO MONZON

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

_____/

COMPLAINT

Plaintiff Emiliano Monzon, as Personal Representative of the Estate of Cirelda Monzon, deceased, sues Defendant United States of America, and alleges:

1. This is a claim for damages for wrongful death pursuant to Sec. 28 USC 1346(b), et. seq.

2. Pursuant to Florida's Wrongful Death Act, Sec. 768.16-768.27 F.S., Plaintiff brings this claim on behalf of the survivors of Cirelda Monzon, her widower and three minor children, listed below, and her estate, all residents of Duval County, Florida.

3. On or about May 17, 1998, at the Fort Matanzas inlet in St. Johns County, Florida, Cirelda Monzon died of drowning in the Atlantic Ocean while attempting to rescue her minor daughter, Idalmi, who had been caught in a rip current while bathing there.

4. Just prior to her drowning, Cirelda Monzon and her three daughters had driven on to the beach owned

and maintained for bathers by the United States at the invitation of the United States and for which Cirelda Monzon paid a fee. Although that fee may have been collected by St. Johns County, the United States either shared in or profited from that fee, but even if not, the United States required the payment thereof in permitting her to drive onto and park her car on said beach.

5. The United States knew that the public would be using that said beach for parking in order to swim in the bordering Atlantic Ocean on that date.

6. The United States knew that there would be dangerous rip currents in the Atlantic Ocean bordering said beach on said date which would make swimming at said beach very dangerous to the public using that beach for such recreation.

7. Knowing of said danger and knowing of the public's presence and use of said beach to go swimming, Defendant had a duty to warn Cirelda Monzon and her daughters of the hidden danger of the rip currents in the surf at said beach on that date as such rip currents are not obvious to persons untrained in the science of oceanic weather observation.

8. Defendant breached said duty by failing to warn the users of said beach of that hidden danger on that date.

9. As a result, Cirelda Monzon and her children had no knowledge of the danger in the surf adjacent to the beach where they parked at Defendant's invitation.

10. As a result, Cirelda's minor daughter Idalmi was caught in a rip current in the surf to the east of where

their car was parked on Defendant's beach and Cirelda plunged into the surf to rescue Idalmi. In doing so, Cirelda inhaled sea water into her lungs and died of drowning.

11. As a result, Cirelda's surviving spouse Emiliano Monzon lost his wife's companionship and protection, and her support and services, and suffered mental pain and suffering from the date of her loss and will suffer those losses and damages in the future.

12. As a result, the minor daughters of the deceased, Idalmi Monzon, Anamaria Monzon and Maribel Monzon lost the support and services of their mother, lost her companionship and protection and suffered mental pain and suffering from the date of her death and they will suffer those losses and damages in the future.

13. As a result, the estate of Cirelda Monzon incurred medical and funeral expenses and loss of the prospective net accumulations of an estate, reduced to present money value.

WHEREFORE Plaintiff Emiliano Monzon, as personal representative of the Estate of Cirelda Monzon demands judgment against Defendant United States on behalf of the survivors of Cirelda Monzon and her Estate.

FOERSTER, ISAAC, & YERKES, P.A.

/s/ David R. Lewis
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